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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SEATRAIN LINES, INC., PACIFIC FAR EAST LINES, INC. AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–50) is reported at 460 F. 2d 932. The memorandum order of the Federal Maritime Commission, approving Agreement No. 9903 and denying a request for investigation and hearing (Pet. App. 51–54), is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1972. The petition for a writ of certiorari was filed on June 20, 1972; it was granted on December 11, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350.

QUESTION PRESENTED

Whether Section 15 of the Shipping Act, 1916, which provides that certain agreements among water common carriers must be filed with the Federal Maritime Commission and, if approved by the Commission, are immune from the antitrust laws, covers an agreement for the acquisition of one carrier's assets by another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, provides in pertinent part:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *

* * * * * *

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission * * *.

* * * * *

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of [the antitrust laws] * * *.

* * * * * *

STATEMENT

A. The acquisition

Respondents Pacific Far East Line, Inc. ("PFEL") and Oceanic Steamship Company ("Oceanic") are common carriers by water engaged in the foreign commerce of the United States. On October 1, 1970, they entered into an agreement providing for the sale by Oceanic of all its assets to PFEL (App. 2–32).[1] Under the agreement, Oceanic transferred to PFEL its entire fleet of four operating vessels, together with their equipment, its interest in two container ships then under construction, and its shoreside property and equipment.[2] The agreement also provided for the transfer of Oceanic's employees (App. 11–15); however, Oceanic, a wholly-owned subsidiary of Matson Navigation Company, was permitted to retain its corporate existence and was not foreclosed by the agreement from reentering the trade in the future and competing with PFEL (Pet. App. 19).

---

[1] PFEL, the acquiring firm, is a subsidiary of Consolidated Freightways, Inc., which, prior to the transaction involved here, had acquired 51 per cent of PFEL's stock. Moody, *Transportation Manual*, p. 1601 (1970) (App. 66). Consolidated Freightways is a holding company which has subsidiaries engaged in the businesses of motor freight carriage, ocean shipping, warehousing and transportation equipment manufacturing (*ibid.*). In 1969, the last full year prior to the PFEL-Oceanic agreement, it had operating revenues in excess of $450 million and ranked 19th in operating revenues among the nation's largest transportation companies. Fortune, *Directory of 500 U.S. Industrial Corporations and 50 Largest Banks, Retailing, Transportation, etc. Companies*, p. 38 (May 1970) (App. 60).

[2] Oceanic's vessels operated as the only United States-flag carriers in the North American Pacific Coast-Australasian Trade (App. 38).

By letter dated October 6, 1970, the parties transmitted the agreement to the Federal Maritime Commission, stating (App. 33) that they had "been advised by their respective counsel that the Contract of Sale does not require approval of the * * * Commission under the provisions of Section 15 of the Shipping Act, 1916 * * *." They requested, however, that the letter be considered as "an application for such approval" (*ibid.*) if the Commission should be of a contrary view.

B. Proceedings before the Federal Maritime Commission

The Commission published notice of the agreement, designated Agreement No. 9903, in the *Federal Register* on October 14, 1970 (35 Fed. Reg. 16114), allowing ten days for interested parties to comment or request a hearing. On October 21, 1970, respondent Seatrain Lines, Inc. ("Seatrain"), a common carrier by water serving certain Pacific, Hawaii, and Guam trades, filed a protest and requested a hearing to explore the "anticompetitive and prejudicial consequences" of the agreement (App. 35). The protest alleged that Seatrain was "considering entry" into trade routes in which PFEL and Oceanic operate (App. 35); it objected to the agreement as producing a "concentration of competition on these routes," thereby erecting "a formidable barrier to the entry of any prospective competitor such as Seatrain" (App. 36). "Agreement No. 9903," it further asserted, "will operate to the detriment of the commerce of the

United States, and will be contrary to the public interest" (*ibid.*).

Six days later, following receipt of PFEL's response (App. 38–40), the Commission, on October 27, 1970, issued a memorandum order approving the agreement and denying Seatrain's request for an investigation and hearing. It concluded that Seatrain had failed to present "sufficient information" to require a Section 15 hearing, since, in the Commission's view, the carrier had not indicated that it was in competition with either of the parties, that the agreement prevented it from competing with PFEL in the future, or that PFEL and Oceanic were foreclosed "from competing with each other anywhere at any future time" (Pet. App. 53). The Commission held that Seatrain had "no standing in this matter" and dismissed the protest as "without substance"; without discussing the question of its jurisdiction, it approved the agreement "under section 15 of the Shipping Act, 1916" (*id.* at 53–54). Seatrain's petition to reopen was denied (Pet. App. 55–57).

C. The proceedings in the court of appeals

Seatrain filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The United States, which was a statutory respondent, contended that the Commission had no jurisdiction to approve this particular acquisition agreement, and that its approval was, in any event, in error.

In a comprehensive opinion, the court of appeals held that "the Federal Maritime Commission lacks

jurisdiction under Section 15 of the Shipping Act of 1916, to approve arrangements of the type involved here" (Pet. App. 49). It concluded that "both the language and context of Section 15 itself and the legislative history accompanying it demonstrate that this particular agreement is not covered" (*id.* at 20–21). The court also rejected the Commission's argument that congressional enactments subsequent to the Shipping Act reflect a legislative recognition or grant of Commission jurisdiction in this area (*id.* at 33–38).[1]

SUMMARY OF ARGUMENT

In the Shipping Act, 1916, Congress gave the Federal Maritime Commission jurisdiction to supervise and control "agreements" between common carriers by water. It provided in Section 15 that the Commission's approval of arrangements within any of seven enumerated categories would exempt the transaction from the operation of the antitrust laws. The language of the statute shows that the types of agreements covered are those which contemplate "exclusive, preferential, or cooperative working arrangements" (46 U.S.C. 814). As the Commission acknowledges (FMC Br. 14), " 'acquisition, merger or consolidation' agreements are not specifically enumerated * * *."

[1] Having concluded that Section 15 does not confer jurisdiction upon the Commission to approve the agreement involved here, the court of appeals found it unnecessary to consider the other issues presented. It simply noted that the Commission's peremptory denial of Seatrain's protest and its approval of the agreement on the basis of the pleadings alone precluded an adequate exploration of the problems presented by the proposed acquisition either by the agency in the first instance or by the court on review (Pet. App. 48–49).

The legislative history of the Act demonstrates that Congress did not intend to bring transactions of the latter sort within the Commission's jurisdiction. The statute was based on a comprehensive study of the shipping industry by the House Committee on Merchant Marine and Fisheries, culminating in the Alexander Report which contained specific recommendations the Shipping Act was designed to implement. The Report shows that Congress' use of the term "agreement" in Section 15 was meant to encompass "understandings, conferences and other arrangements" (46 U.S.C. 814) among steamship lines characterized by their continuing nature, that is, agreements contemplating the continued existence of the parties and their active participation in the on-going arrangement for a period of time.

Mergers and acquisitions of control or ownership do not fit this description. They do not anticipate a continuing working relationship; the transaction is essentially a single event which is complete upon consummation. The Alexander Committee recognized this difference; in referring to such arrangements it consistently described them as "mergers", "acquisitions of control," and the like; never did it use the word "agreements" in this context. Moreover, the Committee, pointing out that Congress had only a few years earlier enacted legislation directed to mergers and acquisitions, proposed no new legislation in this area. Rather, it recommended that only "agreements" of a continuing and on-going nature, *i.e.*, cooperative working arrangements, be brought under government su-

pervision and control. The Shipping Act, 1916, accomplished that objective.

The suggestion that Congress by implication intended to confer on the Commission broader authority than indicated by the language of the statute or its legislative history is dispelled by looking to contemporaneous and subsequent legislation conferring on other agencies jurisdiction over corporate amalgamations. Whenever Congress has authorized agency approval over acquisitions of control or ownership, and provided for antitrust immunity for the approved transactions, it has done so in explicit language. Never has it extended jurisdiction in this area simply by the rubric "agreement."

Neither the decisions of the Commission nor the better-reasoned decisions of the federal courts support a reading of the Shipping Act as authorizing the Commission to approve an acquisition by one carrier of the assets of another, thereby removing the transaction from the operation of the antitrust laws.

ARGUMENT

THE FEDERAL MARITIME COMMISSION'S AUTHORITY TO APPROVE, AND THEREBY TO IMMUNIZE FROM THE ANTITRUST LAWS, CERTAIN AGREEMENTS AMONG WATER CARRIERS DOES NOT COVER THE ACQUISITION BY ONE CARRIER OF THE ASSETS OF ANOTHER

The arrangement between PFEL and Oceanic, however characterized by the parties ("Contract of Sale"), the Federal Maritime Commission ("Agreement") or the United States ("Merger"), undeniably contemplates "the sale of all the assets of one common

carrier by water to another" (Pet. App. 22). While the acquired carrier, Oceanic, is permitted to retain its corporate existence to enable it to reenter the trade in the future, the acquisition for all practical purposes eliminates it as a viable competitor of PFEL. The arrangement involves a single transaction which is complete upon consummation and does not require or contemplate any further joint action by the parties for its implementation. This transaction thus is different from the agreements for cooperative working relationships among shipping lines, which this Court examined in *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, and *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238, 241–243.

The question here, as the court below stated (Pet. App. 19; footnotes omitted), is whether acquisitions of this sort "falls within the scope of the Commission's jurisdiction as defined by the Shipping Act of 1916." We agree with the court of appeals that (1) the language of Section 15, (2) its legislative history, (3) contemporaneous and subsequent congressional enactments, and (4) the Commission's own interpretation of the statute and the better-reasoned court decisions, all indicate that they do not.[4]

[4] The question whether the present acquisition by PFEL violates the antitrust laws was not considered by the court of appeals (Pet. App. 27) and is not before this Court. The United States has taken no position on that issue in this or any other litigation.

a. THE STATUTORY LANGUAGE

As originally enacted in 1916, Section 15 of the Shipping Act, 39 Stat. 733, provided for submission to the Commission's predecessor[4] of "every agreement"—including "understandings, conferences and other arrangements"—among common carriers by water:

> [1] fixing or regulating transportation rates or fares;
>
> [2] giving or receiving special rates, accommodations, or other special privileges or advantages;
>
> [3] controlling, regulating, preventing, or destroying competition;
>
> [4] pooling or apportioning earnings, losses, or traffic;
>
> [5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
>
> [6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;
>
> [7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement.[5]

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[4] The predecessors to the present Federal Maritime Commission (75 Stat. 840 (1961)) were the United States Shipping Board (39 Stat. 728, 729, 733 (1916)), the United States Shipping Board Bureau of the Department of Commerce (Exec. Order No. 6166, § 12 (1933)), the United States Maritime Commission (49 Stat. 1985 (1936)), and the Federal Maritime Board (64 Stat. 1273 (1950)). We will refer herein simply to the "Commission."

[5] The 1961 amendments to the Shipping Act did not alter this language. To the extent that the amendments have any bearing on the manner in which Section 15 should be construed, they are discussed *infra*, at pp. 28–31.

As the court below observed (Pet. App. 21), what is distinctive about the first six of the above categories is that they "of necessity imply the continued existence of the parties and their participation in such agreements over time * * *." The language speaks in terms of "on-going" arrangements, primarily those "regulating" various aspects of the shipping trade. See *United States* v. *R. J. Reynolds Tobacco Company*, 325 F. Supp. 656, 659 (D.N.J.), certiorari denied No. 71-157, March 5, 1973. The seventh category differs from the others only in that it is framed in more general terms. When read in context, its clear import is to include within the Act's coverage those "working arrangements" not specifically within the foregoing enumerated categories. It is in this respect no different from the fourth, and final, category of prohibited practices listed in Section 14 of the same statute—*i.e.*, "resort to other discriminating or unfair methods * * *"—which this Court held in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 492, "must be construed as constituting a *catchall clause* by which Congress meant to [cover] other devices not specifically enumerated but similar *in purpose and effect* * * *" (emphasis added).

Thus from the face of the statute, it appears that the Commission's jurisdiction under Section 15 was intended to extend generally to pooling, rate and other cooperative working agreements, which by their very nature require the continued and active participation of the parties thereto. That this is what Congress had in mind is confirmed by the authority it conferred on the Commission under Section 15. The

second paragraph of that Section empowers the Commission to disapprove covered agreements "whether or not previously approved" upon finding them to be "unjustly discriminatory or unfair." The third paragraph declares agreements existing at the time of enactment to be lawful "until disapproved by" the Commission. The fourth paragraph states that agreements subsequently entered into shall be lawful "only when and as long as approved." These provisions further indicate that the jurisdiction Congress gave the Commission was over only those agreements which are, as the court of appeals stated (Pet. App. 22), "amenable to continuing Commission supervision," that is, "on-going" arrangements susceptible to cancellation or modification "[i]f changing conditions warrant it" (*ibid.*). See *Current Legislation-Government Regulation of Private Shipping*, 17 Colum. L. Rev. 357, 358 (1917).[1]

This is not the character of the present "agreement," which, as stated at the outset, provides for the transfer of all of Oceanic's assets to PFEL in a single transaction, thereby "transform[ing] the relationship of the merging parties at the instant of merger" (*United States* v. *R. J. Reynolds Tobacco Company, supra*, 325 F. Supp. at 659). A "subsequent Commission cancellation or modification" of such an arrangement would, in the words of the court below, "be

[1] That the several paragraphs of Section 15 are to be read in relation to each other and in the context of the Section as a whole is not questioned. Compare *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602.

very difficult if not impossible to implement" (Pet. App. 22). "'[A]cquisition, merger or consolidation' agreements" of this sort, the Commission acknowledges (FMC Br. 14), are not "specifically enumerated in the language of Section 15." But, it contends (FMC Br. 7, 13), they should be brought within the Act's coverage as agreements "controlling, regulating, preventing or destroying competition."

This category of agreements, however, was no more intended to be read in isolation than were the rest, and thus it, too, is subject to the qualification which the court of appeals correctly held to be implicit in "[t]he whole structure of Section 15," that the agreements covered must be "of a continuing nature" (Pet. App. 22). To the extent that the language used in the third of the enumerated statutory categories of covered "agreements" admits to any ambiguity in this regard—which we dispute—the Commission's argument for a broader construction in this area is refuted by the legislative history of the Shipping Act, 1916.

B. THE LEGISLATIVE HISTORY OF SECTION 15

The Shipping Act was passed as the result of an exhaustive investigation of the shipping industry by the House Committee on the Merchant Marine and Fisheries under the Chairmanship of Congressman Alexander. See *Federal Maritime Board* v. *Isbrandtsen Co., supra*, 356 U.S. at 487–490; *Volkswagenwerk* v. *Federal Maritime Commission, supra*, 390 U.S. at

275. Following extensive hearings, the Committee issued a lengthy report, generally referred to as the "Alexander Report,"[8] which concluded with a number of recommendations (see PFEL's Br., pp. 1a–10a) that served as the basis for the 1916 legislation.[9]

The Alexander Report discussed the different types of arrangements then being used by American shippers in both the foreign and the domestic trade. Based on responses to questionnaires and circulars distributed to the shipping industry,[10] and on two volumes of hearings and a volume of diplomatic and consular reports, the Committee found that "it is the almost universal practice for steamship lines engaging in the American *foreign* trade to operate * * * under the terms of written agreements, conference arrangements or gentlemen's understandings" that provide for "fixing or regulation of rates," "allotting the ports of sailing," "pooling of earnings," or "meeting the competition of nonconference lines" (Alexander Report, p. 415; em-

[8] See Report of the House Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. Doc. No. 805, 63d Cong., 2d Sess. (1914).

[9] See the Senate Report on H.R. 15455, the bill finally enacted into law, which reprints the recommendations and indicates the heavy reliance that Congress placed on them. S. Rep. No. 689, 64th Cong., 1st Sess. (1916). See *Federal Maritime Board* v. *Isbrandtsen Co., supra*, 356 U.S. at 490, n. 11; *Volkswagenwerk* v. *Federal Maritime Commission, supra*, 390 U.S. at 276, n. 25.

[10] Portions of these questionnaires and circulars are reproduced in the supplement to the *amicus* brief entitled "Legislative History of Section 15 of the Shipping Act of 1916," at pp. 42–47.

phasis added). Indeed, all of the 80 steamship agreements and conference arrangements relating to foreign trade that were analyzed in the Alexander Report concerned on-going working arrangements of the sort enumerated above (Alexander Report, pp. 21–295). "None * * * [bore] the slightest resemblance to an agreement of merger * * *" (*United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659.

With respect to the *domestic* shipping trade, the House Committee observed a somewhat different situation. In addition to the cooperative agreements so prevalent in the international area, there were on the domestic front a number of mergers, consolidations and acquisitions, primarily by railroads seeking to gain control of common carriers by water (Alexander Report, pp. 404–405). The Alexander Report stated (*id.* at 409; emphasis added):

> The numerous methods of controlling competition between water carriers in the domestic trade, referred to in the preceding pages, may be grouped under three headings, *viz.*, (1) control through the *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through *agreements or understandings;* and (3) control through special practices. * * *

This distinction between "acquisitions" or "ownership," on the one hand, and what the House Committee referred to as "agreements or understandings," on the other, is observed "[c]onsistently throughout the Report" (*United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659); "mergers and

other corporate reorganizations * * * are referred to by the terms 'consolidation by ownership' and 'control through acquisition', or variations thereof," but "[n]ever" by "the word 'agreement' " (*ibid.*). When the word "agreement" is used, or a variant thereof (*i.e.*, conference or understanding), it is only in connection with working arrangements of an on-going nature calling for the cooperative participation of the parties for an extended period of time. *Ibid.*[11]

The same distinction is made in the recommendations by the Committee, which Congress effectively implemented in the Shipping Act, 1916. The principal focus of these recommendations was on "the agreements and understandings * * * so universally used * * *" in the foreign trade (Alexander Report, p. 415). Faced with the alternative of outlawing such cooperative working arrangements altogether or placing some restrictions on their continued use, the Committee selected the latter course. It pointed out (*id.* at 416):

> Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would

[11] The use of the word "agreement" in this context, as distinguished from use of the words "own" or "control" when talking of acquisitions, consolidations and mergers, is also seen in the House Resolutions authorizing the Alexander Committee investigations (H. Res. 425 and 587, 62d Cong., 2d Sess.), and in the questionnaires distributed by the Committee (Alexander Report, pp. 10–16).

> either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. * * * [E]ither would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. * * *[11]

In order to forestall such drastic consequences, the Committee recommended that "the several [steamship] lines in any given trade [be permitted] to cooperate through some form of rate and pooling arrangement under Government supervision and control" (*ibid.*). It proposed that this be accomplished by requiring "all carriers engaged in the foreign trade of the United States" to file for approval with the appropriate government authorities "any agreements, understandings, or conference arrangements * * * entered into (1) with any other steamship companies * * * or (2) with American shippers, railroads or other transportation agencies" (*id. at* 419-420).

[11] The Committee also concluded (Alexander Report at 416) that a flat ban on all such working arrangements among steamship lines

> * * * would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. * * *

As the court of appeals correctly observed (Pet. App. 32), "[t]he clear tenor of the Committee's analysis, the problems it faced and the solution it proposed, all related to agreements of a continuing nature." The recommendation that such "agreements" be preserved "under some form of effective government supervision" (Alexander Report, p. 417) did not contemplate similar approval for acquisitions, consolidations or mergers. To the contrary, the latter type of arrangement was an "anathema to the Committee" (*United States* v. *R. J. Reynolds Tobacco Company*, *supra*, 325 F. Supp. at 660).

Indeed, it was the determination to avoid forcing just such permanent and irretrievable combinations between and among carriers that prompted the Committee to recommend *against* a complete prohibition of cooperative working agreements. For the on-going conference or understanding, unlike a merger or other acquisition, although perhaps causing the elimination of competition with respect to rates, still leaves, as pointed out below (Pet. App. 33), "ample room for competition in a variety of areas other than rates, especially those which relate to the quality of service provided by the various steamship lines."[11] Thus, within the area of government supervision contemplated by the Alexander Committee, the competitive

[11] The court of appeals here quoted the following exerpt, reflecting "the range of non-price competition" (Pet. App. 33, n. 28), from Gorter, *United States Shipping Policy*, 145 (1956):

> If we assume, theoretically, that the members of a conference adhere strictly to their agreement, then they must compete

"structure" of the industry is left intact and the parties to the continuing "agreements" survive to continue their competitive "conduct." [34] See Marx, *International Shipping Cartels*, 250–251 (1953). The legislative history reflects no intent to commit to similar administrative supervision arrangements of a wholly different character, such as involved here, which have the immediate effect of changing the competitive structure of the industry by eliminating competitors, rather than merely limiting competition."

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with each other on a so-called nonprice basis. Better service would appear to be the principal inducement to offer to shippers in an effort to obtain their patronage. This means offering faster, more convenient schedules, and special facilities for cargo handling—*e.g.*, refrigerated space. However, even speed may be ruled out as a competitive factor. In some conferences, rates have been geared to speed—the slower the vessel the lower the rates. Actually competition often goes beyond these theoretical confines. Violations of agreements occur and competition intrudes on rates. The abuses will persist so long as they are not flagrant or discovered by disadvantaged "clean" competitors. Such "shadings" of the rules are difficult to eliminate in an arrangement based on self-interest but calling for self-discipline. Competition among conference members is often intense, depending upon conditions in the trade.

[34] "Structure" refers to conditions in any industry which are relatively permanent or which change only slowly and which affect the way a firm in that industry operates—*e.g.*, the number and size distribution of firms in the market. "Conduct" or "behavior," on the other hand, refers to the firm's actions and are usually alterable in relatively short periods of time—*e.g.*, rate-making, pooling arrangements, etc. See Kaysen and Turner, *Antitrust Policy*, 59–60 (1959); Areeda, *Antitrust Analysis*, 70–71 (1967).

[35] Such merger arrangements, moreover, are not characterized by secrecy, which was a principal objection with respect

This is further borne out by the Committee's recommendations with respect to the domestic shipping trade (see PFEL's Br. pp. 1a–10a). It is in this area that the Alexander investigations uncovered substantial evidence of acquisitions and mergers, primarily in connection with efforts by the railroad lines to acquire control or ownership of the domestic water lines. The Alexander Report (pp. 404–405) revealed that, through the acquisition of carriers by water, the railroads then accounted for about 50 percent of all tonnage moving by water in the coastwise and Great Lakes trade.

The Committee, however, did not recommend new legislation to deal with this situation. It pointed out that the recently enacted Panama Canal Act of 1912, "extending the jurisdiction of the Interstate Commerce Commission over interstate transportation which involves the carriage of property by rail and water," went "far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States" (Alexander Report, p. 422). Section 11 of that Act (37 Stat. 566, 49 U.S.C. 5(14)–(16)) specifically forbade, after July 1, 1914, any railroad or other common carrier subject to the jurisdiction of the ICC "to own * * *

to the working agreements and conferences analyzed by the Committee (Alexander Report, pp. 293–295, 307). Thus one of the major reasons given by the Committee (*id.* at 311–313) for requiring working agreements to be filed for approval with government authorities—*i.e.*, to eliminate "the secrecy with which agreements and conferences are now conducted" (*id.* at 417)—has no application in the context of mergers, consolidations and acquisitions, which ordinarily are widely publicized.

control, or have any interest whatsoever (by stock ownership or otherwise, either directly or indirectly * * *) in any common carrier by water operated through the Panama Canal or elsewhere" with which the railroad or other carrier may compete."

Accordingly, the Committee's recommendations with respect to domestic shippers had much the same focus as in the international area. It proposed, among other things, that port-to-port rate and traffic arrangements of domestic water carriers be brought within the supervision and control of the government, that "all agreements or arrangements affecting interstate transportation" be filed for approval, and that "all [interstate] traffic associations or conferences" be supervised by appropriate government authorities (Alexander Report, pp. 422-423). Thus in the domestic trade context, as well, "[t]he clear tenor of the Committee's * * * [proposed] solution * * * related to agreements of a continuing nature" (Pet. App. 32). In fact, in the single recommendation (No. 12) addressed to arrangements of the sort at issue here, the Committee, as it had done "throughout the Report" (*United States* v. *R. J. Reynolds Tobacco Company*, *supra*, 325 F. Supp. at 659), made no mention of "agreements," but urged "that the railroads be prohibited in the future from *acquiring, either directly or indirectly, ownership and control of or interest in canals* * * * when

[10] The prohibition against common control of railroad water transportation was qualified to the extent of authorizing the Commission to permit a railroad to continue to operate a water line other than through the Canal, if, among other things, such operation will not reduce competition on the route by water. 37 Stat. 567.

the same are used in interstate transportation" (Alexander Report, p. 424; emphasis added)."

This legislative background shows that Congress, in enacting the Shipping Act, 1916, "to carry out [the Alexander] recommendations" (*Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. at 490, n. 11), intended to subject to federal supervision under Section 15 only cooperative working arrangements of the sort the House Committee had indicated should be brought under general government control. The statute used the word "agreement" with the same meaning as in the Report, namely, to "describe practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time" (*United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659). To the extent that such a *continuing* "agreement" is one "controlling, regulating, preventing, or destroying competition" (46 U.S.C. 814), it falls within the third category listed in Section 15. But mergers, acquisitions, and consolidations, although perhaps in some instances having a destructive effect on competition, are not for that reason also within the Act's coverage; such arrangements represent "a single, discrete event, which transforms the relationship of the merging parties at the instant of merger" (*United States* v. *R. J. Reynolds Tobacco Company,*

" While, as already pointed out, the Panama Canal Act of 1912 prohibited railroad control of common carriers by water, it did not reach ownership of canals used for interstate transportation. The Committee's recommendation that this practice be reached by additional legislation was not followed by Congress.

supra, 325 F. Supp. at 659). As such, they are outside the scope of "government supervision of anticompetitive working arrangements" (Pet. App. 32) as contemplated both in the language and the legislative history of the Shipping Act of 1916.

c. CONTEMPORANEOUS AND SUBSEQUENT LEGISLATION

1. A comparison of the language of Section 15 of the Shipping Act with that used in contemporaneous and later congressional enactments which confer jurisdiction over corporate amalgamations further indicates that acquisitions and mergers are not transactions that were intended to be encompassed within the term "agreements" in the instant statute. When Congress determined to reach by legislation arrangements of the sort involved here—the acquisition of all assets—it consistently has so stated in clear and specific language.

Thus, as we earlier indicated (*supra*, pp. 21–22), in amending Section 5 of the Interstate Commerce Act to outlaw, *inter alia*, railroad acquisitions of water carriers, Congress, in the Panama Canal Act of 1912, identified the prohibited activity as "to own * * * control, or have any interest whatsoever (by stock ownership or otherwise, either directly or indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any [competing] common carrier by water * * *" (37 Stat. 566–567). Similarly, the same Congress which conducted the exhaustive Alexander investigations of the shipping industry (*Carnation Co.* v. *Pacific Con-*

ference, 383 U.S. 213, 218), when it enacted the prohibition against mergers in Section 7 of the Clayton Act in 1914, employed the terms "acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation" (38 Stat. 731).

As the court of appeals observed (Pet. App. 26), "[i]t is highly unlikely, in view of this specific [contemporaneous] statutory treatment by Congress of the antitrust implications of acquisitions of corporate control, that Congress originally intended to exempt such acquisitions under Section 15 of the Shipping Act by making no specific reference to them but simply by including them under the rubric 'agreement.'" That term does not even reach consolidations of corporate control by direct purchase from stockholders, which was the most prevalent type of acquisition at the time the Shipping Act was passed. See, *e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 338. See Note, *The Shipping Industry Seeks A Safe Haven: Merger Jurisdiction for the FMC,* 5 Law & Pol. Int'l Bus. 274, 280–281 (1973).

Moreover, such a legislative approach would have been inconsistent with the congressional method of dealing with anticompetitive practices in other areas of commercial activity. In Section 407 of the Transportation Act of 1920, 41 Stat. 481–482, for example, which further amended Section 5 of the Interstate Commerce Act, Congress dealt separately with cooperative working arrangements and with consolidations of ownership. It used the term "agreement"

only in describing the former (Sec. 5(1)).[13] With respect to interlocking ownership, the amendment specifically authorized the Interstate Commerce Commission to approve, *inter alia*, "the acquisition [by one carrier] * * * of the control [of another] * * * under a lease or by the purchase of stock in any other manner not involving the consolidation of such carriers into a single system for ownership and operation" (Sec. 5(2)).[14]

Similarly, in Section 412 of the Civil Aeronautics Act of 1938, (now the Federal Aviation Act, 49 U.S.C. 1382), Congress differentiated between working "agreements" (52 Stat. 1004), on the one hand, and airline mergers or acquisitions (52 Stat. 1001), on the other. Both types of arrangements were made subject to the jurisdiction of the Civil Aeronautics Board, and, if approved by that agency were accorded exemption from the antitrust laws (49 U.S.C. 1384).

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[13] The then new Section 5(1) made it unlawful, unless approved by the Interstate Commerce Commission, "for any common carrier * * * to enter into any contract, agreement, or combination with any other common carrier * * * for the pooling of freights * * * or to divide between them the aggregate or net proceeds of earnings * * *" (41 Stat. 480–481).

[14] Section 5(2) also authorized the Commission to permit "two or more carriers by railroad * * * to consolidate their properties * * * into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management and operation * * *" (41 Stat. 481–482).

In 1933, Congress further amended Section 5 to consolidate the provisions of former Sections 5(2) and 5(6) under a new Section 5(4) with common standards for approval of noncarrier control of two or more carriers by stock ownership (48 Stat. 217). In 1940, Sections 5(1), 5(2) and 5(11) were enacted in their present form (54 Stat. 905).

But, in describing the types of cooperative working "agreements" that were covered, Congress employed virtually the same language in the Civil Aeronautics Act (49 U.S.C. 1382) that it had earlier used in Section 15 of the Shipping Act (*McManus* v. *Civil Aeronautics Board*, 286 F.2d 414 (C.A. 2); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290, n. 13), while it used the terms "merger," "ownership," and "acquisition of control" when referring to airline "acquisitions" (49 U.S.C. 1378). Cf. *Pan American World Airways* v. *United States*, 371 U.S. 296, 301–304.[*]

In sum, at no time to our knowledge has Congress used the word "agreement" when it intended to give a regulatory agency jurisdiction over transactions other than cooperative working arrangements of a continuing nature. Where it has made the determination to authorize an agency to approve acquisitions of control or ownership and to confer antitrust immunity upon the approved acquisitions, it has so stated in explicit language. Here, however, as even the Commission acknowledges (FMC Br. 14), "'acquisition, merger, or consolidation' agreements are not specifically enumerated in the language of Section 15 * * *." The court of appeals correctly pointed out (Pet. App. 32) that "[t]hey were neither part of the problem [with which Congress was concerned] nor part of the solution." Instead, the legislative

[*] The Federal Communications Act (47 U.S.C. 221, 222) similarly gives the Federal Communications Commission jurisdiction over "consolidation, acquisition, or control" of telephone companies and over "consolidation or merger" of telegraph companies, and immunizes from the antitrust laws such of those transactions that the Commission approves.

focus was essentially on agreements which the statute itself describes as "exclusive, preferential, or cooperative working arrangements" (46 U.S.C. 814). It was in this area alone that Congress gave the Commission its approval authority under Section 15. As the court below stated (Pet. App. 32), "Congress intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines * * *."[11]

2. The Commission's excerpts from legislative reports published in connection with the 1961 Amendments to the Shipping Act, 1916 (FMC Br. 38–41) do not undermine that conclusion. To the contrary, even assuming that later congressional pronouncements are relevant to the question of what the legislators intended in 1916 (compare *United States* v. *Wise*, 370 U.S. 405, 414), the clear understanding of

[11] The Commission's contention that a contrary reading of the Shipping Act can be gleaned from the 1950 Amendment to the Clayton Act (15 U.S.C. 18)—which exempted from Section 7 coverage "transactions duly consummated pursuant to authority given by * * * [statute to the] Maritime Commission * * *," among others—is, as the court of appeals stated (Pet. App. 35), "a bootstrap attempt to derive a positive statutory grant of authority from what is merely a list of agencies whose then-existing authority Congress did not intend to affect, either affirmatively or negatively." The added reference in Section 7 to the Maritime Commission and other regulatory agencies was not intended as a grant of authority or power which the respective agency did not already possess. See S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7; *California* v. *Federal Power Commission*, 369 U.S. 482, 486; *Milk Producers Association* v. *United States*, 362 U.S. 458, 469–470.

Congress in 1961 was that Section 15 had always contemplated, and would continue to contemplate, that the Commission has jurisdiction only over on-going working arrangements of the sort we have already described.

The 1961 Amendments were in part a response to this Court's decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, which cast doubt upon the Commission's authority under Section 15 to approve exclusive-patronage-dual-rate agreements between independent shippers and a shipping conference." Following that decision, both the Senate Commerce Committee, through its Subcommittee on Merchant Marine and Fisheries, and the House Merchant Marine and Fisheries Committee, through its Subcommittee on Steamship Conferences, conducted exhaustive investigations into the operation of shipping conferences in international trade. A review of this legislative history reveals that the entire focus was on the various conference agreements and devices used by water carriers as cooperative working arrangements; acquisitions and mergers were not even considered."

"Under such agreements, shippers who agree to deal exclusively with members of a shipping conference, rather than with independent carriers in the trade served by the conference, are charged lower rates than are charged shippers who do not so agree. *Isbrandtsen* suggested that certain conference agreements of this sort violated Section 14 of the Act and thus that the Commission was without authority to approve them (356 U.S. at 491–498).

"See Index to the Legislative History of the Steamship Conference / Dual Rate Law. S. Doc. No. 100, 87th Cong., 2d Sess. (1962), which contains a compilation of the pertinent legislative history accompanying the 1961 amendments.

Both Houses reported out bills to amend the 1916 Act. "The bill as reported out by the Senate [S. Rep. No. 860, 87th Cong., 1st Sess.] was more antitrust exemption oriented than that which passed the House [H. Rep. No. 498, 87th Cong., 1st Sess.]" (*Latin America/Pacific Coast Steamship Conference* v. *Federal Maritime Commission*, 465 F. 2d 542, 550 (C.A. D.C.), certiorari denied, No. 72-213, October 24, 1972), and was essentially the one which was enacted into law. To the extent relevant here, it amended Section 15 "to provide considerably broader Commission authority" (*id.* at 550-551) to disapprove conference agreements against the public interest (75 Stat. 763, 46 U.S.C. 814), and added to Section 14 a new provision permitting the Commission to approve dual rate conference agreements satisfying certain specified conditions (75 Stat. 762, 46 U.S.C. 813a).

This special treatment with respect to shipping conferences in the 1961 Amendments to the Shipping Act, is, we submit, entirely consistent with the intent of the 1916 legislators, as demonstrated above, "to grant the Commission authority to deal only with agreements of a continuing nature" (Pet. App. 22). As Senator Schoeppel stated on the floor of the Senate in support of the 1961 legislation (107 Cong. Rec. 19422):

> "* * * U.S. law for 45 years has exempted steamship conferences from the antitrust laws and substituted instead the restraint of Government regulation specifically designed to take into account the international character of the industry. This bill is based on that approach * * *."

Nor does the 1962 Report of the Antitrust Subcommittee of the House Judiciary Committee,[34] to which the Commission refers (FMC Br. 40), contradict this understanding. That Report also deals with the activities of shipping conferences in the foreign trade, and devotes much attention to "the predatory anticompetitive devices of the conferences" (*Latin America/Pacific Coast Steamship Conference* v. *Federal Maritime Commission*, *supra*, 465 F. 2d at 550). But nowhere does it suggest that Section 15 of the Shipping Act confers authority on the Commission to approve acquisition agreements of the sort involved here. To the contrary, in the section of the Report which specifically discusses the types of agreements covered by Section 15, no mention is made of mergers or acquisitions of control or ownership, and the word "agreement" is used consistently in a context connoting cooperative working arrangements of a continuing nature (Report, pp. 333–335; and see *id.* at 5–18).[35]

D. THE COMMISSION'S INTERPRETATION AND RELEVANT COURT DECISIONS

1. Not until its recent divided decision (3–2) in *Merger-American Mail Line and Pacific Far East*

[34] Report on the Ocean Freight Industry, H. Rep. No. 1419, 87th Cong., 2d Sess. (1962).

[35] The Commission's suggestion that the Report indicates a more expansive reading of Section 15 is based on a single reference in the Report to a specific merger transaction between Ivarantsen Steamship Co. and American Export Lines as "an agreement recently approved by the * * * Commission" and on a general statement made some 300 pages later that the word "agreement" in Section 15 "is defined broadly so as to encompass 'all understandings, conferences, and other arrangements'" (FMC Br. 40).

Line, 11 F.M.C. 53, reversed on other grounds, *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796 (C.A. 9), did the Commission take the position that its Section 15 jurisdiction applies to acquisitions of control or ownership as well as to cooperative working agreements. And see *Agreement Nos. 9837 and 9837–1 Between United States Lines, Inc. and Sea-Land Service, Inc.*, F.M.C. Nos. 69–56, 70–51, decided February 12, 1973. Prior to 1967, the Commission had exercised jurisdiction only over arrangements which, as the court of appeals observed (Pet. App. 38–39), were "of a continuing nature calling for the supervision of the Commission, not a single transaction such as a sale of ships with no restrictions governing their subsequent use."[20]

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[20] The various Commission decisions which, it is argued, indicate a broader exercise of jurisdiction are discussed in some detail by the court below, with particular attention to the continuing nature of the relationship between the parties to the arrangement and the need for continuing supervision by the Commission (Pet. App. 39–41, n. 39).

Amicus suggests that the position we urge here with respect to the pure asset acquisition involved in the present case in distinguishable from its situation, allegedly involving a merger by stock acquisition which, as modified by Commission order, requires the acquired carrier to continue to compete with a subsidiary of the acquiring carrier under supervision of the Commission. The agreement, as restructured by the Commission, it alleges, is of an ongoing nature, making the entire transaction the type of working "agreement" contemplated by Section 15. See *Agreement Nos. 9837 and 9837–1*, F.M.C. Nos. 69–56 and 70–51, decided February 12, 1973, reproduced in the Appendix to the "Motion to Grant Writ of Certiorari and Consolidate For Oral Argument" filed in *R. J. Reynolds Tobacco Company* v. *United States*, certiorari denied, No. 71–157, March 5, 1973. It is our position that such a restructuring of a merger, through ancillary covenants relating to the manner in which the parties may hold or operate

Accordingly, far from a consistent administrative interpretation of the Shipping Act in the manner now urged by the Commission, the decisions of that agency during the first 50 years of enactment do not support the contention that Section 15 was understood by the Commission to cover a single sale by one common carrier of all its assets to another. The fact that a narrow majority of the Commission now appears to be of the view that mergers and acquisitions involving domestic carriers are encompassed within the statutory term "agreements" thus provides little guidance on how the language of the Act should properly be construed."

2. Nor, we submit, should significant weight be accorded to the decision by a divided panel of the Ninth Circuit in *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796, which is in conflict with the decision below and with *Reynolds Tobacco Company, supra*. As the court of appeals ob-

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their affiliate companies after the merger or acquisition is concluded, provides no basis for different treatment of the essential transaction under Section 15. To the extent that the Commission has in its more recent decisions intimated otherwise, we believe it was in error. See discussion *infra* at pp. 36–39.

The Commission has consistently taken a contrary view with respect to its jurisdiction over transactions between foreign-flag carriers which serve the United States. See *Alleged Rebates of Mitsui S.S. Co. Ltd.*, 7 F.M.C. 248, 253; *Armement Deppe, S.A.* v. *United States*, 399 F. 2d 794 (C.A. 5), certiorari denied, 393 U.S. 1094. Thus, while exercising its Section 15 approval authority over working arrangements between foreign-flag vessels, it has expressly disclaimed jurisdiction with respect to mergers between foreign-flag carriers. Compare *Meyer-American Mail Line and Pacific Far East Line*, 11 F.M.C. 53, 58, with *City of Portland, Oregon* v. *Federal Maritime Commission*, 433 F. 2d 502 (C.A. D.C.).

served (Pet. App. 46), "the *Matson* court did not engage in the careful analysis of the legislative history which characterizes * * * [the] opinion in *Reynolds Tobacco* * * *."

Moreover, the majority in *Matson* rested its decision that mergers are covered by the Act primarily on this Court's decision in *Volkswagenwerk* v. *Federal Maritime Commission*, *supra*, which it construed as requiring that the language of Section 15 be given "the broadest of readings" (405 F. 2d at 800). But *Volkswagenwerk* involved an agreement by members of an employers' shipping association to allocate among themselves a common assessment to finance a union trust fund. That arrangement, the Court held (390 U.S. at 276), was one of the "myriad of restrictive agreements in the maritime industry" which Congress intended the Commission to scrutinize under Section 15. It was in response to the Commission's "extremely narrow view" (390 U.S. at 273) of what types of "cooperative working agreement[s]" (390 U.S. at 271) came under its jurisdiction that the Court emphasized the "expansive language" of Section 15 (390 U.S. at 273). *"Volkswagenwerk* * * * did not deal with a merger," however, as the dissent in *Matson* pointed out (405 F. 2d at 803); and the above-quoted language used in the separate context of that case "cannot be read to go the whole route and authorize F.M.C. to approve mergers of great shipping corporations" (*ibid.*)."

"With respect to the policy considerations relied upon by the majority in *Matson*, the district court in *Reynolds Tobacco Company*, *supra*, 325 F. Supp. at 661, correctly stated: "* * * extensive reference to considerations of the national interest in

3. Indeed, such a sweeping interpretation of the Commission's jurisdiction under Section 15 of the Shipping Act would effectively remove from the operation of the antitrust laws many transactions which, as we have shown, Congress never intended to bring within the enumerated categories in the statute. Giving such a broad reading to the substantive provisions of that Section and thereby to the antitrust immunity also provided, would be inconsistent with the firmly established principle that legislative grants of immunity from the antitrust laws are to be "construe[d] * * * strictly." *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316; and see *Milk Producers Association* v. *United States*, 362 U.S. 458, 463–466. As this Court reiterated recently in *Otter Tail Power Co.* v. *United States*, No. 71-991, decided February 22, 1973, slip. op. 5, quoting *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–351: "'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.'" See also *Silver* v. *New York Stock Exchange*, 373 U.S. 341; *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 315.

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shipping are irrelevant to the construction of the statute." It further pointed out (*ibid.*): "The other arguments advanced in *Watson* assume a Congressional intent favoring F.M.C. authority over mergers. However, it is that intent which is the key issue for determination. Congress intended to dilute antitrust policy with respect to restrictive on-going working agreements or arrangements among shipping companies, but it does not necessarily follow from that fact that Congress also intended that mergers embodying a more serious anti-competitive character were to be similarly treated."

No such "repugnancy" has been demonstrated in the present case (see n. 21, *supra*)." In such circumstances, this Court has stated, with specific reference to situations such as involved here, that it "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Conference*, *supra*, 383 U.S. at 218. And see *California* v. *Federal Power Commission*, *supra*, 369 U.S. at 485. "If Congress had desired to grant any further immunity, Congress would doubtless have said so" (*United States* v. *Borden Co.*, 308 U.S. 188, 201). We agree with the court of appeals (Pet. App. 26) that its "silence * * * in Section 15 with respect to the subject of * * * control of ownership can only be taken to mean that Congress had no intention by the Shipping Act of 1916 to exempt such arrangements from the normal administration of the antitrust laws."

The actual holding of the court of appeals was that the Commission has no jurisdiction under Section 15 of the Shipping Act, 1916, over the acquisition of one

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" The Shipping Act does not provide a pervasive regulatory scheme for controlling ocean transportation in foreign commerce (compare *Otter Tail Power Co.* v. *United States*, *supra*, slip op. 7). It does not confer upon the Federal Maritime Commission power to regulate entry into the business of ocean transportation; nor does it confer *general* rate-making power in foreign commerce, as distinguished from the limited authority given in this area to correct "unjustly discriminatory" rates (46 U.S.C. 816), and to disapprove rates which are found to be "so unreasonably high or low as to be detrimental to the commerce of the United States" (46 U.S.C. 817(b)(5)).

carrier's assets by another. In distinguishing certain Commission decisions (see n. 26, *supra*), however, the court indicated that the Commission might have jurisdiction over a merger transaction that was not limited to a simple acquisition of assets, as in the present case, but also contemplated some continuing relationship between the parties, such as a covenant to compete or not to compete (Pet. App. 43, 40 n. 39). The *amicus curiae*, R. J. Reynolds Tobacco Company, which is a party to an acquisition recently approved by the Commission which purportedly provides for such a continuing relationship (see the *amicus'* Motion to Grant Writ of Certiorari and Consolidate for Oral Argument, filed in No. 71-157, *supra*, at pp. 1a-177a), argues in its brief that, whether or not the Commission has jurisdiction over the PFEL-Oceanic transaction, it does have jurisdiction over the Reynolds' arrangement.

To the extent that the court of appeals determined that the Commission has jurisdiction of acquisitions if they contain ancillary agreements of an on-going nature, we submit that the court was in error. In our view, no valid distinction can be drawn between the pure acquisition (whether it be of assets, stock, or otherwise) and an identical transaction which is coupled with some further agreement envisioning a continuing relationship between the parties. Such ancillary covenants do not alter the fundamental character of the basic transaction, or make less applicable the considerations we have already discussed that led Congress to define the Commission's jurisdiction under Section 15 to exclude acquisitions, mergers or consolidations.

The acquisition by one carrier of the ownership or control of another eliminates the former carrier as an independent competitive factor in the trade (cf. *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 335–349); this anticompetitive effect upon the structure of the market is no different because the carriers simultaneously enter into a further agreement of a continuing nature. Perhaps the Commission may have jurisdiction under Section 15 over the latter ancillary agreement if the underlying transaction is valid under the antitrust laws, even though it has no jurisdiction over the basic acquisition itself; but there is no warrant either in the language or the legislative history of the statute for such limited jurisdiction to be expanded in the manner suggested by the *amicus*.

The distinction the court of appeals drew between simple acquisitions and those that are accompanied by agreements which envision continuing relationships is bound to create uncertainty over the scope of the Commission's jurisdiction, and to result in attempts to change the form of acquisitions so as to subject them to Commission approval and thus obtain antitrust immunity.[*] Although this Court ordinarily does

[*] In the *R. J. Reynolds* case, *supra*, Reynolds sought Commission approval of an agreement to acquire all the stock of the United States Lines. During oral argument before the Commission, Reynolds' counsel for the first time suggested that Reynolds would agree to maintain another subsidiary (Sea-Land) and United States Lines as separate and competitive subsidiaries under its common control and subject to continuing jurisdiction of the Commission; the acquisition agreement was thereafter approved by the Commission subject to conditions which incorporated that undertaking. See motion to consolidate and grant writ, No. 71-157, *supra*, pp. 171a–172a and n. A94 at 172a.

not pass on questions unnecessary to the decision of the issue before it, it has occasionally done so in order to eliminate an unsound precedent that it believed should not be allowed to stand. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 387. We suggest that this is such a case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.
IRWIN A. SEIBEL,
Attorney.

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